The Tender Years Presumption: Is It Presumably Unconstitutional

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THE TENDER YEARS PRESUMPTION: IS IT PRESUMABLY UNCONSTITUTIONAL?

In custody disputes between the natural parents of young children, a presumption is often raised that custody should be awarded to the mother. Mothers are perceived as better custodians through their physical caretaking ability and cultural biases regarding the role of women in the family. This Comment argues that the tender years presumption is violative of the equal protection clause of the fourteenth amendment. It explores and questions the basic assumptions behind the presumption and argues that there is a lack of factual support for the legislative or judicial opinion that mothers should be presumed better parents.

INTRODUCTION

Custody disputes arising out of divorce proceedings are predominantly resolved according to the "best interests of the child." A child's best interests, however, are often difficult to determine. Since 1830, American courts have resorted to use of the tender years presumption to decide some of these difficult custody questions.

The tender years presumption dictates that in a custody dispute between the natural parents of a young child, the child should remain with its mother. The presumption is based upon a legislative or judicial perception that a mother is inherently better suited, both

1. Statutory support for the "best interests" standard can be found in virtually every custody statute. Likewise, decisional support abounds in construing these statutes in accordance with the child's "best interests." For a discussion of the standard's historical development and a list of those jurisdictions utilizing the best interest standard, see Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 233-37 & 236 n.45.

2. This difficulty led one judge to remark:

   These contested child custody cases are never easy, and this case is no exception. From the nature of such disputes, involving as they do one of the basic instincts and great primal urges of human existence, whichever way judges rule is bound to leave a trail of heartache and pain. But decide them we must, for it is our job . . . .


4. Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. FAM. LAW 423, 432 (1976-77). For an extensive listing of cases, see id. at 432-34.
biologically and emotionally, to care for young children.\(^5\) When used, the presumption is always rebuttable,\(^6\) but its weight varies according to jurisdiction.

Custody disputes differ from most other adjudicatory proceedings.\(^7\) Procedurally, they develop in much the same manner as other civil actions,\(^8\) including service of process,\(^9\) discovery,\(^10\) and pre-trial conference.\(^11\) The differences between other adjudicatory proceedings and custody proceedings emerge at trial. No right to jury decision is guaranteed;\(^12\) the custody decision is made by a trial judge who exercises a wide degree of discretion.\(^13\) Although typically only parents are parties to the suit,\(^14\) the child's best interests will govern at trial.\(^15\) One judge has recognized the interplay between the rights of parents and those of their children:

Confusion about the nature and function of the so-called 'tender years presumption' results from confusion between two important societal values — the right of a parent to custody of its minor child and the right of a child to the custodial care of a parent. In the scale of values, society gives priority to the latter. This is so principally because society owes one of its dependent members a duty superior to the duty it owes a self-sufficient member.\(^16\)

Custody decisions also involve no determination of the guilt or innocence of the parties. The basic issue at trial is which parent will

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5. See Roth, supra note 4, at 424-25.
7. This is primarily due to the degree of state regulation in custody law. See 2 Foster & Freed, Law and the Family 500 (1966).
8. Custody proceedings are commenced in one of three ways:
   (1) in the context of a marital dissolution;
   (2) in a separate custody proceeding such as one based upon an application for a change of custody; or
   (3) in a petition for a writ of habeas corpus.

10. Child Custody, supra note 8, § 6.03.
11. Child Custody, supra note 8, § 17.01.
12. Child Custody, supra note 8, § 18.05.
13. Child Custody, supra note 8, § 19.03.
14. Child Custody, supra note 8, § 26.06. One author has argued judges are vested with so much discretion that they adjudicate on an "ad hoc" basis. See Klaff, The Tender Years Doctrine: A Defense, 70 Calif. L. Rev. 335, 357-58 (1982).
15. Other parties who can be joined in the suit include:
   (1) any managing conservator;
   (2) any possessory conservator;
   (3) any persons having access to the child under an order of the court;
   (4) any persons required by law or by an order of the court to provide support for the child;
   (5) the guardian of the person of the child; or
   (6) the guardian of the estate of the child.

Child Custody, supra note 8, § 6.03[2].
16. See supra note 1.
better serve the child's interests.\textsuperscript{17} Evidence of superior parental ability is ultimately condensed into factors weighed by the trial judge.\textsuperscript{18} These factors include: the child's age, gender and health; the relationship between the child and the parent; the parent's moral behavior and life-style; and the cultural, religious and educational environment in which the child will be raised.\textsuperscript{19}

The tender years presumption should not be confused with a "presumption of law." Presumptions of law allow a party to make an evidentiary showing of a presumed fact after establishing the basic fact giving rise to the presumption.\textsuperscript{20} Presumptions are based upon considerations of social policy, convenience, or fairness.\textsuperscript{21} Their essential characteristic is that certain procedural consequences flow from their use. Once a presumption of law is established, the opponent must produce rebuttal evidence or risk a directed verdict.\textsuperscript{22} A presumption is termed rebuttable because sufficient rebuttal evidence will eliminate the effect of the presumption.\textsuperscript{23}

The tender years presumption does not strictly follow this procedural formula. In some jurisdictions, "[i]t is more a practical consideration than a rule of law."\textsuperscript{24} The strength of the presumption depends upon which of three common forms it assumes.

First, it may be used as a tool of judicial convenience; when all other factors are equal, the mother is the preferred custodian of a young child.\textsuperscript{25} The presumption is therefore viewed as a "tie-breaker" in those cases where no qualitative differences in parental ability are apparent.

Second, the presumption may be used as an evidentiary factor in determining the child's best interests.\textsuperscript{26} Because custody proceedings involve balancing interests, courts using this form of the presumption

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\textsuperscript{17} See Mnookin, supra note 1, at 236 n.45 and accompanying text.
\textsuperscript{18} Wetzler v. Wetzler, 570 P.2d 741, 743 (Alaska 1977).
\textsuperscript{19} Child Custody, supra note 8, § 27.05. This list of factors is not intended to be exhaustive. See id.
\textsuperscript{20} See C. McCormick, Evidence § 342 (2d ed. 1972).
\textsuperscript{21} See id. § 343.
\textsuperscript{22} See id. at § 345.
\textsuperscript{23} States differ as to what effect the presumption will continue to have after rebuttal. See id.
\textsuperscript{24} Parker v. Parker, 467 S.W.2d 595, 596 (Ky. Ct. App. 1971).
\textsuperscript{26} See Foster & Freed, supra note 3, at 331.
will favor the mother from the outset. Fathers seeking custody must overcome this extra hurdle by proving their own parental ability.

Lastly, the presumption may require custody be awarded to the mother absent clear and convincing evidence that she is unfit. This is the harshest application of the presumption and the most difficult to overcome. To do so, fathers must not only meet the heavy burden of proving the mothers' unfitness, but must prove their own fitness as well.

Over the last decade the tender years presumption has come under increasing attack from legislatures, judges, and legal scholars.


29. Thirty states and the District of Columbia have enacted statutes which explicitly eliminate a gender preference in custody determinations. Statutory language varies considerably; therefore the following list is a somewhat artificial grouping.


Legislatures have amended their custody statutes for a variety of reasons. The following preface to a 1979 amendment in the Arkansas custody statute illustrates the intense pressure legislative bodies are under to promote equality between the sexes in custody proceedings:

It is hereby found and determined by the General Assembly of the State of Arkansas that it is exceedingly difficult for divorced fathers to obtain custody of their children, notwithstanding that they are more qualified in many instances than the divorced mothers, and that this results in an environment detrimental to the welfare of the children. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force from the date of its passage and approval.
One court has held the presumption violative of its state equal rights amendment. Two courts have expressly held the presumption to be violative of the equal protection clause of the fourteenth amendment.

This Comment explores the constitutionality of the tender years presumption. It reviews the Supreme Court's current standard of review in gender-based discrimination cases. This Comment then applies that standard to the tender years presumption. Since recent sociological and psychological data indicate a lack of support for the underlying bases of the tender years presumption, arguably its use fails the constitutional test.

CONSTITUTIONAL STANDARDS

The equal protection clause of the fourteenth amendment has been used for more than a decade to measure the constitutional validity of gender-based statutory and administrative classifications. The standard by which equal protection is afforded, however, has been a source of confusion and debate.

Beginning in 1971 with Reed v. Reed, the Supreme Court con-
considered the constitutionality of statutory classifications that discriminate between men and women on the basis of gender. Applying a standard somewhat more demanding than minimal scrutiny, the Court stated such classifications “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”

Since Reed, the Court has struggled to establish the appropriate constitutional test for gender discrimination cases. In the Court’s next gender discrimination case, Frontiero v. Richardson, four justices considered sex to be a “suspect class,” mandating that the statute be rationally related to a legitimate legislative purpose. The Supreme Court has stated the test in numerous ways to reflect varying degrees of deference to legislative authority. See, e.g., Hodel v. Indiana, 452 U.S. 314, 331 (1981) (“Social and economic legislation . . . must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose.”); Morey v. Doud, 354 U.S. 457, 465 (1957) (“a statutory discrimination must be based on differences that are reasonably related to the purposes of the [statute].”); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (“[t]he means selected shall have a fair and substantial relation to the object of the legislation . . . ”). Most statutory classifications pass constitutional muster under the minimal scrutiny test.

An intermediate level of scrutiny, used in gender discrimination cases, requires a stronger showing. The classification must bear a substantial relation to an important governmental objective. See infra notes 50-53 and accompanying text.

The highest level of scrutiny, strict scrutiny, requires the state have a compelling interest in maintaining the statutory classification, and that the classification is necessary to accomplish the legislative goal. Strict scrutiny is applied in two situations: where a statute classifies with regard to “suspect” classes, such as race, Loving v. Virginia, 388 U.S. 1 (1967), national origin, Korematsu v. United States, 323 U.S. 214 (1944), or alienage, Graham v. Richardson, 403 U.S. 365 (1971), and where it impinges upon a fundamental right found explicitly or implicitly in the Constitution, such as travel, Shapiro v. Thompson, 394 U.S. 618 (1969), voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), or abortion, Roe v. Wade, 410 U.S. 113 (1973).

Because a federal statute was involved, the Court based its analysis on the equal protection component of the fifth amendment. Id. at 690-91. See also, e.g., Rostker v. Goldberg, 453 U.S. 57, 61 n.3 (1981) (upholding male only draft registration); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (upholding differential treatment for promotion); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (prohibiting educational inequality based on race).
utory classification pass strict judicial scrutiny. The dissent declined to accept the standard expressed in the plurality opinion and argued that Reed controlled.

*Craig v. Boren* is the seminal case proposing the modern equal protection standard applied in subsequent gender discrimination cases. That standard requires that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." This two-pronged test has been described as an "intermediate" standard of review.

Whether a classification violates the Craig standard is determined on a case-by-case basis. The terms "important governmental objec-

44. 411 U.S. at 688. Although a plurality of the Court held sex to be a "suspect classification," later decisions make it clear that sex is not treated as a suspect classification. See Craig v. Boren, 429 U.S. 190, 199 (1976), and Stanton v. Stanton, 421 U.S. 7, 13 (1975), where the Court found Reed controlling, not Frontiero. See supra note 40 for a brief discussion of strict scrutiny.

45. The dissenting opinion was written by Justice Powell, joined by Chief Justice Burger and Justice Blackmun. Justice Stewart dissented on other grounds.

46. Justice Powell argued the Court should exercise judicial restraint in light of the (then) probable passage of the ERA amendment. 411 U.S. at 692.

47. Id.

48. 429 U.S. 190 (1976). The Craig Court invalidated an Oklahoma statute which prohibited males from purchasing "non-intoxicating" 3.2% beer until age 21, while females were permitted to purchase at age 18.

49. In the period between Frontiero and Craig, the Court decided Kahn v. Shevin, 416 U.S. 351 (1974) and Schlessinger v. Ballard, 419 U.S. 498 (1975). In both cases, the Court upheld statutes designed to compensate women for past discrimination. Such statutory classifications are referred to as "benign" discrimination because, although they classify on the basis of gender, they are intended to remedy a prior discriminatory policy. See generally H. Kay, Sex-Based Discrimination 72-79 (1981).

The legislature must in fact have intended that these statutes be remedial. "The mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975).

In its most recent gender discrimination case, the Court reaffirmed the viability of "benign" discrimination. See Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3338 (1982) where Justice O'Connor, writing for the majority, stated, "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." Id. at 3338.


52. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 723 (2d ed.
“substantially related” are open to a variety of judicial interpretations. “Important governmental objective” implies the state’s interest must be considerable; “substantially related” refers to a means-ends test.

Subsequent decisions have refined the application of the Craig standard, but the test itself remains unchanged. In challenges to gender-based statutory classifications, the burden of persuasion remains on those defending the discrimination. The Craig test is met when the party seeking to uphold a statute provides an “exceedingly persuasive justification” for its continued existence.

Craig gave the Court its first opportunity to decide a case where the statutory classification discriminated against males. Later cases have established that whether a statute discriminates against males or females, the standard of review remains the same.

Administrative convenience as a justification for gender-based statutory classifications was firmly rejected in Frontiero v. Richardson.

1983). See also Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (questioning how the Court will apply the newly formulated standard in future cases).

53. In Michael M. v. Superior Court, 450 U.S. 464 (1981), Justice Rehnquist commented “[t]he question whether a statute is substantially related to its asserted goals is at best an opaque one.” Id. at 474, n.10. One author states the problem aptly:

Although the Court articulated a standard of review in [Craig] — the disputed statutory classification must have a substantial relationship to an important governmental objective — its application of this standard has been rudderless. Whether a relationship is ‘substantial’ or an objective ‘important’ within the meaning of the equal protection clause depends on the ultimate goal of the inquiry, yet the Court has never clearly enunciated this goal.


54. See J. Nowak, R. Rotunda & J. Young, CONSTITUTIONAL LAW 714 (2d ed. 1983) (state interest must be “significant”).

55. Id. at 723 (“[t]hose laws which appear . . . to be a reasonable means of compensating women . . . will be upheld”).


59. Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3336 (1982) (“That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”).

60. 411 U.S. 677 (1973). “[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.” Id. at 690 (citations omitted). Often, statutes have been defended on the basis of administrative convenience. The term is used by courts as a “catch-all” phrase, one which describes the legislative judgment to choose a particular course of action. This legislative decision is usually an economic choice. When
ative convenience has not been entirely foreclosed. To use the concept successfully in gender discrimination cases, the defense must satisfy the heightened level of scrutiny applied in Craig.

The most recently decided gender discrimination case, *Mississippi University for Women v. Hogan,* reiterates many of the foregoing principles. The Court reconfirmed its adherence to *Craig* and made clear that gender classifications will not receive strict judicial scrutiny.

**APPLICATION OF CONSTITUTIONAL PRINCIPLES TO THE TENDER YEARS PRESUMPTION**

Whether the tender years presumption is constitutional can only be decided by a thorough application of the *Craig* test. That test has two parts. The first, requiring state interest in maintaining a gender-based classification, appears to be satisfied. The state certainly has an important interest in promoting the welfare of its children. The question remains, however, whether a presumption favoring mothers over fathers in child custody cases is substantially related to the achievement of that objective.

Justifications for the tender years presumption generally rely upon one or all of the following claims:

First, because women can breastfeed their babies, women possess


61. In Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), Justice White, writing for the 8-1 majority, observed, "It may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause . . . ." *Id.* at 152.

62. *Id.*

63. 102 S. Ct. 3331 (1982). In *Hogan,* the Court held that a state statute denying qualified males access to a state-supported nursing program violated the equal protection clause of the fourteenth amendment.

64. "We begin our analysis aided by several firmly-established principles." *Id.* at 3336-37.


66. One defender of the tender years presumption has even termed the state's interest compelling. *See* Klaff, *supra* note 13, at 365.

67. Breastfeeding is biologically possible for women because of their ability to lactate. Lactation is defined as (1) the production of milk, or (2) the period following childbirth during which milk is formed in the breasts. T. Steedman, *Stedman's Medical
a biological advantage over men in the quality of care that can be given to a young child.\textsuperscript{68}

Second, children of tender years\textsuperscript{69} form a psychological and physiological bond with the mother, both during the birth process and the postnatal period,\textsuperscript{70} and that bond should not be broken.

Third, mothers possess the superior knowledge and skill required for the child's daily care.\textsuperscript{71} Cultural biases have long favored maternal over paternal care, and, with the presumption, continue to do so.\textsuperscript{72}

Fundamental problems exist with each of these justifications.

\textit{The Ability to Breastfeed}

Three criticisms can be directed toward the claim that a woman's ability to breastfeed should influence the custody decision. First, women may choose not to breastfeed. Studies indicate only a small proportion of women breastfeed long enough for significant beneficial effects\textsuperscript{73} to be passed on to their infants.\textsuperscript{74} Protection provided to infants against allergic reactions, for instance, may require natural feeding for a minimum of six months.\textsuperscript{75}

Second, although doctors generally agree beneficial effects are associated with breastfeeding, doubt remains regarding the deleterious effects of high levels of contamination from environmental pollutants

\textsuperscript{68} See infra note 73.

\textsuperscript{69} It is not clear exactly at what age a child is of "tender years." H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 585 (1968). See also Polkoff, Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations, 7 WOMEN'S RIGHTS L. REP. 235 (1982) ("While tender years has rarely been defined, the age of seven is frequently cited"). See also, e.g., Isaak v. Isaak, 278 N.W.2d 445, 447 (S.D. 1979) (Wollman, C.J., dissenting) ("[E]ven if it could be said that the nine-year-old boy was not of tender years, I do not know if it could seriously be suggested that the younger boy [six and one-half-years] was not.").

\textsuperscript{70} See infra note 79 and accompanying text.

\textsuperscript{71} See Klaff, supra note 13, at 343. \textsuperscript{72} See infra note 4, at 423.

\textsuperscript{73} Pediatricians generally agree that breastfeeding is beneficial. The extent of those benefits, however, is greatly debated. Generally, claims are made that breastfeeding: (1) has nutritional advantages for the infant; (2) promotes antibody production in infant blood; (3) strengthens the mother-infant bond; and (4) is economically preferable to alternative modes of feeding. See Mata, Breast-feeding: Main Promoter of Infant Health, 31 AM. J. CLINICAL NUTRITION 2058 (1978); Can. Paediatric Society, Breast-Feeding: What is Left Besides the Poetry?, 69 CAN. J. PUB. HEALTH 13 (1978). For a generalized bibliographical listing of breastfeeding articles, see Ashworth, Infant and Young Child Feeding-A Selected Annotated Bibliography, 6 EARLY HUM. DEV. S1 (Supp. 1982).

\textsuperscript{74} One study conducted in 1973-76 found that although 65% of the women surveyed began to breastfeed, only 29% persisted six months or longer. D. ENTWISLE & S. DOERING, THE FIRST BIRTH: A FAMILY TURNING POINT 135-36 (1981).

\textsuperscript{75} R. LAWRENCE, BREAST FEEDING: A GUIDE FOR THE MEDICAL PROFESSION 250-51 (1980).
in human milk.\textsuperscript{76}

Third, conceding both a high incidence of breastfeeding and that such feeding is beneficial, this is not conclusive evidence that the child's needs could not otherwise be met. The high incidence of non-breastfeeding women indicates that children's nutritional needs are somehow otherwise being met. Beyond that, recent psychological and sociological studies reveal that factors other than its source of nutrition present a greater threat to a child's well-being.\textsuperscript{77} Factors such as the quality of parental care, the tendency to resort to child abuse,\textsuperscript{78} and the economic resources of the parent tend to minimize the importance of breastfeeding as a determinative factor in awarding custody according to the child's best interests. Although, only women possess the ability to breastfeed, breastfeeding alone is not of such critical importance to warrant a presumption in a custody proceeding.

\textsuperscript{76} One study confirmed the existence in levels above allowable FDA concentrations of DDT, PCB's and other toxic chemicals. The authors stated "the role of milk contaminants in the production of disease in children is virtually unstudied." Rogan, Bagniewska & Damstra, \textit{Pollutants in Breast Milk}, 302 NEW ENG. J. MED. 1450, 1452 (1980). See also, e.g., Kendrick, \textit{Testing for Environmental Contaminants in Human Milk}, 66 PEDIATRICS 470 (1980); Stagno, Reynolds, Pass & Alford, \textit{Breast Milk and the Risk of Cytomegalovirus Infection}, 302 NEW ENG. J. MED. 1073 (1980).

In some cases it may be more harmful for infants to drink human, rather than animal milk. This may be true where women are exposed to high levels of toxic chemicals in their employment, or where these chemicals are in close proximity to their residence, as in the Love Canal case. See, e.g., OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, \textit{HABITABILITY OF THE LOVE CANAL AREA} (1983) (discussing potential health effects of exposure to low concentrations of carcinogens).

\textsuperscript{77} Courts are increasingly concerned about the sexual morality of parents. See Wadlington, \textit{supra} note 20, at 263-65. Emotional neglect or physical abuse also significantly affect a child's development. See \textit{infra} note 78 and accompanying text.

\textsuperscript{78} Although child abuse is an old phenomenon, awareness of its widespread existence has developed only recently. Child abuse can take many forms. The list below indicates some primary manifestations. Refer to the sources indicated for definition and explanation of the following:

2. Munchausen syndrome — Meadow, \textit{Munchausen Syndrome by Proxy}, 57 ARCHIVES OF DISEASE IN CHILDHOOD 92 (1982);
4. Infant reumination syndrome — Fleischer, \textit{Infant Rumination Syndrome}, 133 AM. J. DISEASES IN CHILDREN 266 (1979); and

The Mother-Infant Bond

Empirical studies purport to show the existence of a mother-infant bond. Such studies hypothesize the mother's relationship to her child has a unique quality because of this bond. These studies, however, share a common weakness: they tend to focus on the mother-child relationship, ignoring the child's development in a multifaceted social system. Deprived of a mother, infants will "attach" to fathers, siblings, or other caretakers. The term 'bonding' is misleading, because it merely describes the tendency of infants to attach to whomever is around them.

Studies claiming to show a "critical period" when the initiation of the mother-infant relationship takes place have been similarly criticized. The critical period is alleged to be a period immediately after birth when an infant may initiate the bonding relationship with its mother. If this opportunity is missed, if there is no intimate mother-child contact during the critical period, some psychologists maintain that the child will suffer irreparable psychological harm.

No study to date has conclusively demonstrated either the bonding or critical period effects. Many have questioned their validity. A lack of consensus among professionals concerning the validity of maternal bonding theory exists. Given this disagreement, courts should hesitate before placing significant reliance upon the concept.

82. Attachment has been defined as "an affective tie that the infant forms to another specific person, binding them together in space and enduring over time." J. BOWLBY, ATTACHMENT AND LOSS, VOL. 1: ATTACHMENT (1969).
83. M. RUTTER, MATERNAL DEPRIVATION REASSESSED 141-142 (1981) ("[T]he argument is that the child's relationship with the mother differs from other relationships specifically with respect to its attachment qualities, and the evidence indicates that this is not so."). See also Chess & Thomas, supra note 80, at 220 (infants may show a positive affiliation even with strangers).
85. Id. at 219; Chess & Thomas, supra note 80, at 217 (citing Rutter, supra note 81, at 141-42).
86. Chess & Thomas, supra note 80, at 217.
88. One group of authors state that the evidence is "entirely inadequate." Herbert, Sluckin & Sluckin, supra note 84, at 210.
89. "There appear to be no indications from animal studies, and seemingly no evidence from human studies, that directly support the theory that there is a brief optimal time after delivery during which the mother is able to form an attachment to her infant." Chess & Thomas, supra note 80, at 217.
90. Chess & Thomas, supra note 80, at 215.
Until the issue is determinatively settled, if ever, the notion that a maternal bond exists should be "factored out" of the custody calculation.

*The Advantages of Motherhood*

The traditional role of mothers as the wellspring of love and affection in the family has been used to justify the tender years presumption.\(^9\) Yet, even the most settled traditionalists must recognize that the role of women as mothers in contemporary society is changing.\(^9\)

Since 1950 women have steadily increased their percentage of participation in the labor force.\(^9\) Not only have more women worked, but they have worked in increasingly diversified occupations.\(^9\) This trend indicates that many women have left their traditional role as homemakers, and have become "working mothers."\(^9\) An implied corollary to this shift is that women must rely increasingly on both paternal care and outside child care centers to perform those functions previously rendered by them as traditional homemakers.\(^9\)

Of course, not all women have abandoned the traditional role of motherhood. On the contrary, because many women still are the primary caretakers of the family, an evaluation on a case-by-case basis — free from the constraints of a judicial presumption — is necessary.

Complementary changes in paternal roles also undermine the tender years presumption.\(^9\) Fathers have consistently demonstrated

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91. This thought has often been judicially expressed. See, e.g., Washburn v. Washburn, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100 (1942) ("It is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love."). See also Sheehan v. Sheehan, 51 N.J. Super. 276, 290-91, 143 A.2d 874, 882 (1958); Klaff, supra note 13, at 348.
94. Hesse, supra note 93, at 60 n.5.
95. *Id.* at 54; Strober, *Formal Extrafamily Child Care—Some Economic Observations*, in *Sex Discrimination and the Division of Labor* 14 (C. Lloyd ed. 1975) ("in March 1972, 5.2 million children under six had working mothers").
96. Strober, supra note 95, at 351-54.
97. For a special issue devoted specifically to an examination of changing male sex roles inside and outside the family, see Lewis & Pleck, *Men's Roles in the Family*, 28
the ability to provide competent care for their children. Studies suggest it is not motherhood per se, but the essential qualities of "mothering" that are important to healthy child development. Because the ability to provide mothering does not depend on the parent's gender, fathers should stand equally with mothers in their ability to fulfill the mothering function.

These socioeconomic changes reveal a lack of support for the judicial perception that women continue to be confined to roles within the family institution. Although judicial notice of these changes has been slow, some progress was made in Watts v. Watts. Watts was the first decision to hold the tender years presumption violative of the equal protection clause of the fourteenth amendment.

**The Craig Test Applied**

The tender years presumption would probably survive a rational relationship test. Although, as indicated in the preceding discus-
sion, many of the underlying justifications for the presumption are questionable, a rational relation may exist between the parent's gender and the important state objective of furthering the child's best interests. This relation could exist because in numbers alone, women probably assume the primary caretaking role more often than do men. 104 Thus, it would be rational for the state to presume that women should be awarded custody.

The Craig test, however, requires more than mere rationality. 105 Craig and its progeny require the maternal presumption be substantially related to the best interests of the child. All three applications of the presumption 106 fail to meet this burden.

When the presumption is used to require the father to demonstrate the mother's unfitness, the Craig test is not satisfied. A finding that the mother is fit beyond a certain minimum level bears no substantial relation to who will be the best parent. Considerations of superior parental ability involve several factors, 107 many of which will be unrelated to fitness of the mother.

When the presumption is used as a factor, which from the outset weighs in favor of the mother, it likewise fails the Craig test. There simply is not in every case a substantial relation between the maternal preference rule and the best interests of the child. In those cases where it is in the child's best interests to remain with the mother, such a showing should be made to the court as part of the mother's burden of proof.

Where all other factors are equal, and the presumption is used as a "tie-breaker," the most serious equal protection violation occurs. This arbitrary choice is exactly the kind of discrimination which the fourteenth amendment forbids. 108 The recent case of Ex Parte Devine 109 underscores this very point. Devine involved an equal protection challenge to the tender years presumption in Alabama. 110 The

104. Despite changing societal values that have provided alternatives to traditional roles, many women remain in occupations complementary to their caretaking roles. See Hesse, supra note 93, at 58. The high percentage of custody awards to mothers (90%) may also indicate that women assume the caretaking role more often than men. See supra note 72.

105. See supra notes 48-53 and accompanying text.

106. For a discussion of the three forms, see infra notes 25-28 and accompanying text.


110. Id. at 688.
trial court determined that the parties were equally fit and awarded custody to the mother based upon the tender years presumption.\textsuperscript{111} The Alabama Supreme Court reversed, holding the tender years presumption unconstitutional.\textsuperscript{112} After determining the \textit{Craig} test was the applicable equal protection standard,\textsuperscript{113} Justice Maddox commented:

\begin{quote}
Courts have come to rely upon the presumption as a substitute for a searching factual analysis of the relative parental capabilities of the parties, and the psychological and physical necessities of the children . . . . In view of the fact that the welfare of children and competing claims of parents are at stake, such a means of determination cannot be justified.\textsuperscript{114}
\end{quote}

\textit{Devine} relied upon \textit{Caban v. Mohammed},\textsuperscript{115} a United States Supreme Court case. In \textit{Caban}, a putative father challenged the constitutionality of a New York statute allowing an unwed mother, but not an unwed father, to block the adoption of their minor child by withholding consent.\textsuperscript{116} The \textit{Caban} Court asserted "maternal and paternal roles are not invariably different in importance. Even if . . . mothers as a class were closer than . . . fathers to [young children] . . . [the presumption] concerning parent-child relations would become less acceptable as a basis for judicial distinctions as the age of the child increased."\textsuperscript{117}

Drawing upon the apparent neutrality between the sexes as evidenced in the \textit{Caban} opinion, the \textit{Devine} court held the tender years presumption unconstitutional.\textsuperscript{118} Although \textit{Devine} reaches a result in harmony with the position advocated in this Comment, the court stopped short of attacking a fundamental assumption of the tender years presumption.\textsuperscript{119} When a court uses the presumption as a tie-breaker, it must first reach a tie.

Careful application of a balancing test in child custody adjudications should not yield a tie. Although in principle a tie could be reached, even by a thorough evaluation of all the evidence, it should not be reached. It is hard to imagine a case in which the relative merits of the parties could not be determined. Such a result would run counter to the American system of dispute resolution. The wide discretion given to judges in custody hearings is a preferable means of reaching a result than to allow courts to "resort to the crutch of a

\textsuperscript{111} \textit{Id.} at 687.
\textsuperscript{112} \textit{Id.} at 686.
\textsuperscript{113} \textit{Id.} at 692-95.
\textsuperscript{114} \textit{Id.} at 696.
\textsuperscript{115} 441 U.S. 380 (1979).
\textsuperscript{116} \textit{Id.} at 385.
\textsuperscript{117} \textit{Id.} at 389.
\textsuperscript{118} 398 So. 2d at 695.
\textsuperscript{119} The court never reached the issue of whether a tie existed. Instead, it remanded to the trial court with instructions to apply a list of factors. \textit{Id.} at 696-97.
presumption."\textsuperscript{120}

If judges more effectively use the input from counselors in the family court\textsuperscript{121} or even the psychological reports of doctors testifying for the parties, surely one parent would emerge more qualified than the other. In close cases, many courts resort to an award of joint custody.\textsuperscript{122} Where legislatively permitted, joint custody represents a more just alternative to the use of the tender years presumption.\textsuperscript{123} At the very least, the example of the Devine court should be followed: the case was remanded to the trial court with instructions to apply a list of factors.\textsuperscript{124} To do otherwise is to sanction a "coin-flip" approach to justice.

\textbf{CONCLUSION}

There are no easy answers in the area of child custody adjudication. Perhaps this is why courts have resorted to the use of the tender years presumption. Such resort, however, should be a last resort. Arguably, the use of this presumption is unconstitutional. Given the opportunity, the United States Supreme Court should so hold.

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\begin{footnotesize}
\textsuperscript{120} Bazemore v. Davis, 394 A.2d 1377, 1383 (D.C. 1978) (en banc).

\textsuperscript{121} Often, courts will use input from psychologists, psychiatrists, or trained social workers. See CHILD CUSTODY, supra note 8, § 27.02(1). The term "counselor" encompasses all three of these professionals.

\textsuperscript{122} Joint custody awards imply sharing both legal control and physical care of a child. The arrangement confers a hypothetical equality between parents with regard to access to the child and amount of time spent with him or her. A full discussion of the concept is beyond the scope of this work. See Moller, Joint Custody: A Critical Analysis, 14 TRIAL LAW. Q. No.1, 36 (1982).

\textsuperscript{123} One defender of the presumption states that "the presumption should not be used . . . where joint custody is both feasible and desirable for the child." Klaff, supra note 13, at 343.

\textsuperscript{124} Ex Parte Devine, 398 So. 2d 686, 696 (Ala. 1981).
\end{footnotesize}